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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of Part 1 of the	)	**WT Docket No. 97-82**
Commission's Rules --	)	
Competitive Bidding Procedures	)	
	)	
Allocation of Spectrum Below	)	**ET Docket No. 94-32**
5 GHz Transferred from	)	
Federal Government Use	)	
	)	
4660-4685 MHz	)	

To: The Commission

COMMENTS OF
THE RURAL TELECOMMUNICATIONS GROUP

RURAL TELECOMMUNICATIONS GROUP

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SUMMARY

The experience gained from 15 spectrum auctions indicates that rural telephone companies are not being availed of adequate opportunities to participate in the provision of spectrum-based services and that licensees are not deploying these services to rural areas as Congress mandated in Section 309(j) of the Communications Act of 1934, as amended.

The Commission must adopt mechanisms that will promote the deployment of these services to rural America and enhance the ability of rural telephone companies to participate in spectrum auctions, win licenses and rapidly deploy new and innovative services to persons residing in rural areas. In order to be able to participate meaningfully in the competitive bidding process, rural telephone companies require a standard 25 percent bidding credit for all future auctions, unless they qualify as a small business entitled to a 35 percent bidding credit. Geographic service areas should be reduced to Metropolitan Statistical Areas ("MSAs") and Rural Service Areas ("RSAs") so that rural telephone companies can realistically acquire and utilize the licenses they acquire. Any service specific in-region restrictions on the provision of new services by incumbent local exchange carriers should not apply to rural telephone companies. All of these mechanisms are necessary to ensure that rural telephone companies have a meaningful opportunity to participate in the competitive bidding process for the provision of spectrum-based services. Most importantly, the Commission should adopt a "fill-in" policy for spectrum-based services to ensure that licensees do not hold rural geographic areas hostage.

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The Rural Telecommunications Group ("RTG"), by its attorneys, hereby respectfully submits these comments in response to the *Third Report and Order and Second Further Notice of Proposed Rulemaking* ("*Third R&O*" and "*FNPRM*") released by the Federal Communications Commission ("FCC" or "Commission") on December 31, 1997 in the above-captioned proceeding. RTG's comments address the Commission's call for further discussion of mechanisms that would improve opportunities for rural telephone companies to provide spectrum-based services.

I. STATEMENT OF INTEREST

RTG is a group of rural telephone companies who have joined together to promote the efforts of its member rural telephone companies to speed the delivery of new, efficient and innovative telecommunications technologies to the populations of remote and underserved

sections of the country. All of RTG's members either directly or through affiliates provide local exchange telephone service in rural areas, and are either contemplating an expansion into new types of wireless services, or have already diversified their service offerings to provide such wireless services. Many of RTG's members have experienced obstacles to market entry or frustration in attempts to excel in the provision of new wireless services in large part because the Commission has repeatedly failed to design competitive bidding provisions that afford rural telephone companies opportunities to acquire spectrum allocated for new services. RTG is therefore well-positioned to make recommendations regarding the streamlining of the competitive bidding rules.

II. DISCUSSION

In attempting to streamline and standardize the rules applicable to competitive bidding, the Commission in the *FNPRM* restates its belief that rural telephone companies have had "favorable opportunities" to participate.[1] The Commission then seeks comment on mechanisms that would "further" opportunities for rural telephone companies. As RTG will explain below, rural telephone companies in fact have *not* had favorable opportunities to participate. More importantly, and often overlooked by the Commission, the Commission's competitive bidding policies have not ensured the rapid deployment of services to rural America, as required by the Telecommunications Act of 1996. Accordingly, RTG suggests numerous mechanisms to provide rural telephone companies with meaningful opportunity to participate and to ensure that licensees

[1] *FNPRM* ¶ 185.

provide advanced spectrum-based services to persons residing in rural areas.

A. Section 309(j) of the Act *Requires* the Commission to Adopt Mechanisms to Promote the Rapid Deployment of New Services to Rural Areas and to Ensure That Rural Telephone Companies Have an Opportunity to Participate in the Provision of Spectrum-Based Services.

The Communications Act of 1934, as amended ("Communications Act"), requires the Commission to promote "the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas."[2] Congress specifically directed the Commission to meet this objective by ensuring that rural telephone companies have a meaningful opportunity to participate in the provision of spectrum-based services. To this end, Congress *enumerated* the separate and distinct entities that are to receive special provisions in the dispensing of spectrum-based telecommunications licenses. Section 309(j)(4)(D) directs the Commission to:

> ensure that small businesses, **rural telephone companies**, and businesses owned by minority groups and women are given the opportunity to participate in the provision of spectrum-based services.[3]

Congress understood that rural telephone companies would deploy new services to rural America. Accordingly, Congress recognized rural telephone companies, not for their size, but for their unique structural position in the nationwide communications network, and directed the Commission to afford them opportunities to provide new services to rural areas.[4] Unlike other

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[2] 47 U.S.C. § 309(j)(4)(D).

[3] 47 U.S.C. § 309(j)(4)(D) (emphasis added).

[4] In addition to Section 309(j), other provisions of the Communications Act reflect Congress's acknowledgment of the important and unique role of rural telephone companies. *See, e.g.,* 47 U.S.C. § 251(f) (rural telephone company exemption from interconnection obligations);

"small businesses," rural telephone companies necessarily fill a particular niche in the lives of rural Americans by providing the newest, most technologically advanced services to areas of this country that, for purely economic reasons, do not attract larger providers or new entrants.[5] The cost of entering a rural area with rugged terrain, harsh climates and population densities so low there might be tens of miles of empty space between individual subscribers is financially prohibitive for some entities, and economically unattractive for most. The primary reason rural telephone companies and cooperatives were even formed in the first place is because local residents did not have telephone service and realized that the Bell companies and larger independents had no plans to serve them, thereby leaving these rural residents to fend for themselves by providing their own telephone service.

Rural carriers have a civic presence in the communities they serve, and telecommunications infrastructure that others are dissuaded from constructing due to the exorbitant costs involved and the low revenue return to be expected on the investment. Most rural carriers have served their study areas for generations and have deep roots in their communities and a solid sense of obligation to the subscribers they serve. In many cases, rural carriers are the carriers of last resort for their study areas, and in this sense they simply cannot choose not to attempt to bring the latest technologies to their demanding subscribers. In other words, if these rural telephone companies do not provide the service that their subscribers want,

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47 U.S.C. § 254 (Universal Service Support).

[5] For example, three RTG members provide wireless cable service to their telephone subscribers not because of the high return on their investment, but because the local cable company would not extend cable service to the area, even though in many instances, extending coaxial cable would have been more cost effective than the wireless cable service provided by RTG's members.

it simply will not be provided.

Yet, over the course of the past 15 service auctions, the Commission has denied rural telephone companies the specific preferences they require in order to acquire licenses to ensure the rapid deployment of new wireless services to rural America, and in so doing, the Commission has failed to ensure that rural Americans have communications options similar to those of their urban counterparts at reasonably related prices.[6]

Rather than providing rural telephone companies with competitive bidding benefits, the Commission has repeatedly lumped rural telephone companies in with "small businesses," affording them the assistance of preferences such as bidding credits and installment payment plans if, and only if, they fit the definition of "small business" that happened to be devised for a particular service. Unlike newly formed "small business" applicants, however, rural telephone companies are ongoing concerns and are not free to reorganize or form questionable "small business entities" to meet the Commission's "control group" *du jour* criteria. In addition, as

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[6] *See, e.g., In re* Rulemaking to Amend Parts 1, 2, 21 and 25 of the Commission's Rules to Redesignate the 227.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services, *Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rulemaking*, CC Docket No. 92-297, FCC 97-82 at ¶ 362 (rel. March 13, 1997) ("*LMDS Second R&O*") (special provisions not needed for rural telephone companies); *In re* Amendment of the Commission's Rules to Establish Part 27, the Wireless Communications Service, *Report and Order*, GN Docket No. 96-228, FCC 97-50 at ¶ 200 (rel. Feb. 19, 1997) (no provisions for rural telephone companies); *In re* Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, Narrowband PCS, *Third Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, PP Docket No. 93-253, 10 FCC Rcd 175 (1994) (provisions for rural telephone companies unnecessary); *In re* Amendment of Parts 21 and 74 of the Commission's Rules with Regard to the Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, *Report and Order*, MM Docket No. 94-131, PP Docket No. 93-253, 10 FCC Rcd 9589 (1995) (no special provisions for rural telephone companies).

discussed below, the "controlling interest" standard proposed in the *FNPRM* for determining small business status, is unduly broad and would exclude many legitimate small rural telephone companies from the definition of small business.

Most importantly, *it is unlawful* to require rural telephone companies to meet any criteria *other than* being rural in order to receive designated entity treatment. Had Congress intended this, it would not have singled out rural telephone companies as a distinct class deserving of preferences. The legislative history of the 1993 Budget Act[7] states:

> The Conferees also agreed to require that the Commission provide economic opportunities for **rural telephone companies in addition to** small businesses and businesses owned by members of minority groups and women.[8]

Congress *did not* state that preferences should be afforded to rural telephone companies that *are* small businesses, as that term has been variously defined; Congress expressly mentions rural telephone companies, **in addition to** small businesses, as a designated entity class entitled to special provisions. The obligation the Commission must meet with respect to rural telephone companies is related to, but independent of, its similar obligations to other designated entities. The law is the law and the Commission cannot continue to illegally shirk its responsibility for implementing it.

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[7] Omnibus Reconciliation Act of 1993, Pub. L. 103-66, § 6002, 107 Stat. 312 (codified as amended at 47 U.S.C. § 309(j) (1996)).

[8] H.R. Rep. No. 213, 103d Cong., 1st Sess. 484 (1993) (emphasis added).

B. Contrary to the Commission's Assertion, Rural Telephone Companies Have Not Had Favorable Opportunities to Participate in the Competitive Bidding Process.

In the *FNPRM*, the Commission states its "belief" that "auctions have generally provided rural telephone companies with favorable opportunities."[9] The Commission recites its observation that "to date, rural telephone companies have won about 44 percent of the 123 rural Basic Trading Areas (BTA) licenses in the United States."[10]

Unfortunately, this observation is extremely misleading as RTG explained in its letter to the Members of the House and Senate Telecommunications subcommittees, a copy of which is attached. The FCC self-servingly coined the term "rural BTA" specifically for the Report to Congress and nowhere defines what it means by a "rural BTA". Not only does the Cimmission's Report to Congress fail to define "rural BTA"; the *FNPRM* fails to define it. In discussions RTG's counsel had with various FCC personnel, RTG has been able to determine that the FCC apparently made no effort to determine which BTAs predominantly contain counties that are actually rural in character (*i.e.* sparsely populated over a large geographic area) and instead arbitrarily picked the 123 BTAs (one quarter of all BTAs) with the lowest populations and slapped on the term "rural BTA." In a map contained in the Report to Congress which purportedly depicts rural telco coverage of the "rural BTAs," the FCC includes indisputably urban areas such as the Seattle-Tacoma BTA (population 2,708,949) and the San Antonio BTA (population 1,530,954).[11]

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[9] *FNPRM* ¶ 179 (citing the FCC Report to Congress on Spectrum Auctions, WT Docket No. 97-150 (rel. Oct. 9, 1997) ("Report to Congress").

[10] FNPRM at ¶ 179 (quoting Report to Congress).

[11] Report to Congress, p. 25.

More importantly, the term "rural BTA" is an oxymoron since by definition, a BTA is composed of one or more population centers surrounded by less populated areas that may or may not be rural or under served, but that are economically linked to the population center. Providing service to the urban population center within a BTA is not the same thing as providing service to rural or underserved areas within a BTA. For example, under the Commission's characterization, the Denver BTA would not be considered rural. Yet, even a brief look at a BTA map reveals that most of the 33 counties in the Denver BTA, particularly those in Eastern Colorado are rural in nature. In addition, many smaller BTAs are comprised of only one or two counties. Such BTAs may be smaller in population relative to other BTAs, but they are not necessarily rural in character. Accordingly, any blanket characterization of a BTA as "rural" based solely on population reflects at best a fundamental misunderstanding of demographics and at worst is intentionally manipulative.

The Commission's characterization is also deceptive in that the FCC never explains what services are allegedly reflected by the 44% of the 123 "rural BTAs" rural telephone companies are alleged to have won at auction. Upon investigation, RTG learned that the Commission's observation actually only depicts areas where rural telephone companies won licenses for Broadband Personal Communications Services (PCS). Broadband PCS is only one of the nine services reflected in the Report to Congress that the FCC has licensed by auction. As indicated in Appendix C-2 of the Report to Congress, rural telephone companies have only won licenses in four of the fourteen spectrum auctions conducted thus far. Not a single rural telephone company

won a license in the following services[12]:

National Narrowband PCS
Interactive Video Delivery Service
Regional Narrowband PCS
900 MHz Specialized Mobile Radio Service
110° Direct Broadcast Satellite
148° Direct Broadcast Satellite
Cellular Unserved Areas
Digital Audio Radio Service

In reality, the nation's rural telephone companies have fared only slightly better in acquiring spectrum licenses than small businesses owned by minority women (who are also not receiving any special treatment).[13] Of the over 1,000 rural telephone companies in the country, only 49 (fewer than 5%) have won licenses for spectrum-based services. (Report to Congress, Appendix C-2). This figure hardly indicates successful participation by rural telephone companies.

From the rural telephone company perspective, the Commission's characterization regarding opportunities for rural telephone companies and successful auction participation is misleading and disingenuous. It reflects the Commission's continuing hostility to Congress's directives in Section 309(j) of the Act which requires that the FCC promote the participation of rural telephone companies in spectrum-based services and ensure the rapid deployment of advanced telecommunications services to rural America.

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[12] Subsequent to the issuance of its Report to Congress, the FCC conducted an auction for the 800 MHz Specialized Mobile Radio (SMR) service. Once again, not one of approximately 1,000 rural telephone companies won an SMR license.

[13] Unlike minorities and women, however, rural telephone companies are not a constitutionally suspect class.

C. The Commission's Policies Have Not Promoted the Rapid Deployment of Services to Rural America

Sadly, the Commission has yet to adopt any meaningful measures to ensure the rapid deployment of spectrum-based services to rural and under served areas. Contrary to the Commission's belief,[14] geographic partitioning does not bring new services to rural areas. The Commission's own records reflect that at the time of the Report to Congress there had only been 12 partitioning deals for auction licensed services.[15] RTG has repeatedly instructed the Commission that many licensees are unwilling to partition smaller geographic areas because (1) it is more burdensome than profitable to negotiate and administer small rural partitioning deals, and/or (2) licensees ultimately intend to sell their systems to larger operators and do not want to carve up their license areas.[16] RTG's members have generally found licensees in services such as broadband PCS and Multipoint Distribution Service ("MDS") to be uninterested in negotiating or consummating small, rural partitioning deals. A large LEC has gone on the record

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[14] *See, e.g., LMDS Second R&O* at ¶ 179 ("[I]f it is profitable to provide [LMDS] service to rural areas, a licensee should be willing to do so, either directly or by partitioning the license and allowing another firm to provide service.").

[15] *See* RTG Comments filed August 1, 1997, at n. 7, WT Docket No. 97-150.

[16] RTG members have repeatedly been given each of these excuses by license winners. *See also*, RTG's Comments and Reply Comments in response to Geographic Partitioning and Spectrum Disaggregation by Commercial Mobile Radio Service Licensees; Implementation of Section 257 of the Communications Act--Elimination of Market Entry Barriers, *Notice of Proposed Rulemaking*, WT Docket No. 96-148, GN Docket No. 96-113; *see also* RTG Comments (filed June 18, 1997), *In re* Amendment of the Commission's Rules to Establish New Personal Communications Services, Narrowband PCS, *Report and Order and Further Notice of Proposed Rulemaking*, GN Docket No. 90-413, ET Docket No. 92-100, PP Docket No. 93-253, FCC 97-140 (rel. April 23, 1997) ("*Narrowband PCS R&O and FNPRM*").

indicating its reluctance to partition its licenses with rural telephone companies.[17] There is simply no incentive for licensees to partition to entities willing to serve high cost rural areas.

The Commission's increasingly lenient performance requirements, wherein some licensees need only make a showing of "substantial service" by 10 years, permits licensees to retain a license by serving the most densely populated areas of a service territory while rural areas lie fallow. In light of the limited use of partitioning and of the lack of evidence of service to rural areas, the Commission cannot legally conclude that it has met its obligation to ensure the delivery of new spectrum-based services to rural and under served areas. The Commission has too long overlooked rural America and the letter and spirit of the law. Section 309(j) is plain on its face. In prescribing regulations to implement the competitive bidding process, the Commission must include provisions to "ensure the prompt delivery of service to rural areas,"[18] and to promote economic opportunity for rural telephone companies to participate in the provision of spectrum-based services.[19] The Commission's competitive bidding rules currently do not comply with the Act. In fact, the rules serve to violate the Act. Accordingly, the Commission should institute additional mechanisms to ensure compliance with the law.

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[17] *Subdividing Licenses Holds Promise for Small Carriers But Some Large Companies Aren't Looking to do Small Deals*, Land Mobile Radio News, Vol. 51, No. 18 (May 2, 1997) (reporting that GTE has decided not to enter into partitioning deals with rural telephone companies because "[i]t costs just as much to negotiate a small contract as a large one . . . making them less attractive.").

[18] 47 U.S.C. § 309(j)(4)(B).

[19] 47 U.S.C. § 309(j)(4)(C) and (D).

D. The Commission Should Adopt the Following Mechanisms to Promote the Deployment of Telecommunications Service to Rural Areas and to Ensure Rural Telephone Companies an Opportunity to Participate in the Provision of Such Service.

1. Unserved Area Fill-In Policy

In order to ensure that licensees either rapidly deploy services to rural areas or partition licenses to those who will, the Commission should adopt a fill-in policy for all auctioned services similar to the fill-in policy adopted for cellular service. The cellular fill-in policy was extremely effective in ensuring that licensees deployed service even in rural areas. The Commission has never adequately explained its departure from this fill-in policy. Such a policy will not disrupt the auction process because bidders can formulate their business plans and bidding strategy to reflect the potential that another entity may be ready, willing and able to serve an area that the licensee in either unwilling or unable to serve. No public interest benefit can be derived from preventing a company from providing service to a rural area that the licensee itself does not intend or is unwilling to serve. Indeed, a fill-in policy encourages more capital to flow into a new service from many additional sources. It is time for the Commission to wake up and smell the coffee by realizing that spectrum properties are being viewed much the same as real estate. The auctions are attracting speculators who may acquire and hold licenses undeveloped, over time until the spectrum's value increases. These speculators are not investing in new innovative technologies that will one day serve rural areas. These speculators are delaying the advancement of new technologies and holding rural America hostage.

In order to ensure rapid deployment of service to rural areas, five years after the license grant, any company should be allowed to apply for and serve any unserved areas. This will

encourage licensees to partition areas that they lack the capital to develop or to form partnerships or other arrangements with companies willing to provide the service. Nothing is to be gained by denying service to rural America for 15 years when the Commission hopefully wakes up and realizes that its "liberal" performance requirements have utterly failed to ensure deployment to rural America.

2. Bidding Credits

As previously discussed, Congress distinguished rural telephone companies from "small businesses" for purposes of competitive bidding.[20] For all future auctions, rural telephone companies will have an established definition, which RTG and National Telephone Cooperative Association advocated and the FCC adopted in the *Third R&O* of this proceeding.[21] As distinct entities defined not by size, but by service,[22] rural telephone companies require a dedicated bidding credit tailored to their needs. As noted above, rural telephone companies are ongoing concerns and are not free to restructure to "small business control group entities." Accordingly, the Commission should adopt a standard bidding credit of 25 percent for rural telephone companies, regardless of their average annual gross revenues. Providing a standard 25 percent bidding credit is consistent with Congress's directive that the Commission create assistance measures specifically for rural telephone companies, and would increase their ability to

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[20] 47 U.S.C. § 309(j)(4)(D); H.R. Rep. No. 213, 103d Cong., 1st Sess. 484 (1993).

[21] *Third R&O* at ¶¶ 31-33 (amending 47 C.F.R. § 1.2110(b)(3) to conform the definition of rural telephone company to the definition contained in the Telecommunications Act of 1996).

[22] *Id.* at ¶ 47.

participate in auctions despite the fact that they are undercapitalized in comparison to most other bidders. Rural telephone companies whose average annual gross revenues do not exceed $3 million for the preceding three years should be entitled to a 35 percent bidding credit in services in which the Commission allows this highest level of bidding credit.

3. Geographic Service Areas

Section 309(j) requires the Commission to prescribe service area designations that promote economic opportunity for designated entities and to prescribe regulations to ensure prompt delivery of service to rural areas.[23] The Commission has increasingly sought to license services based on large geographic service areas with almost no meaningful performance requirements.[24] This policy has had an adverse impact on the deployment of service to rural America and on designated entity participation. The larger the geographic service area, the slower and less likely the deployment of a new service to its rural portions.[25] Due to the tremendous cost involved in winning a large area license and subsequently building it out, the

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[23] Section 309(j)(4)(B), (C).

[24] *See, e.g., In re* Amendment of the Commission's Rules to Establish New Personal Communications Services, Narrowband PCS; Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, Narrowband PCS, *Report and Order and Further Notice of Proposed Rulemaking*, GN Docket No. 90-314, ET Docket No. 92-100, FCC 97-140 (rel. April 23, 1997) (Narrowband PCS currently licensed nationwide and in five regions; proposing redesignating Basic Trading Area ("BTA") and Major Trading Area ("MTA") licenses into additional regional and nationwide licenses); *In re* Amendment of the Commission's Rules to Establish Part 27, the Wireless Communications Service ("WCS"), *Report and Order*, GN Docket No. 96-228, FCC 97-50 (rel. Feb. 19, 1997) (licensing in 6 Regional Economic Areas ("REAs") and 53 Major Economic Areas ("EAs").

[25] *See* Comments of RTG in the WCS proceeding, GN Docket No. 96-228 at 3-7 (filed Dec. 4, 1996).

acquisition of such a license tends to be a viable undertaking only for large companies that can target and serve large urban areas.

By contrast, the use of small areas, such as Metropolitan Statistical Areas ("MSAs") and Rural Service Areas ("RSAs"), facilitates the delivery of service to rural areas by increasing the opportunities for rural small businesses and rural telephone companies to acquire licenses. Once again, cellular service provides a perfect example of a service where small service areas facilitate the rapid buildout of a comprehensive network. Smaller license areas permit local businesses to acquire spectrum and tailor service to meet the needs of rural spectrum users. Authorizing smaller geographic areas increases the number of licenses available and the diversity of licensees, as required by Section 309(j). This, in turn, allows more capital to enter the market from many different sources and encourages the development of new and innovative technologies and service offerings as well as fostering the development of niche services and services specifically targeted to rural markets. Rural telephone companies have been more successful in auctions that have used BTAs.[26] Accordingly, in no event should spectrum-based service be licensed in areas larger than BTAs.

4. In-Region Exemption

The best way to meet the objectives of the Telecommunications Act of 1996, especially in rural America, is to permit rural telephone companies to acquire licenses for new services for their current study areas, even if the Commission determines that a specific service requires in-

[26] *See* Report to Congress, Appendix C-2 (32 rural telephone companies won licenses in D, E, and F Block PCS auction).

region restrictions for non-rural local exchange carriers ("LECs") to avoid anti-competitive behavior. In most cases, rural carriers are the only entities interested and capable of bringing a new service to their service areas, and restricting their ability to win licenses for in-region service effectively denies the rapid deployment of new services to rural subscribers.

Section 309(j)(3)(A) of the Communications Act charges the Commission with promoting "the development and rapid deployment of new technologies, products and services for the benefit of the public, **including those residing in rural areas**, without administrative or judicial delays."[27]

In rural areas, rural telephone companies have economies of scale and scope that allow them to expand existing services at lower costs than a start up venture. Despite the Commission's logic in the LMDS auction,[28] in many rural areas, only the rural telephone company could even begin to afford to provide the wireless service. For example, in rural eastern New Mexico, one RTG member faces a population density of 0.8 people per square mile. Yet, this particular RTG member has been able to provide cellular service (in large part due to the FCC's build-it-or-lose-it in five years unserved area rule[29]) and wireless cable service.[30] No

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[27] 47 U.S.C. § 309(j)(3)(A) (emphasis added).

[28] LMDS *Second R&O*, ¶ 180 (if it is profitable to provide service in rural areas, a licensee will do so).

[29] *See* 47 C.F.R. § 22.949.

[30] This RTG member began providing service prior to the auction in which it only won one of three of the BTAs it needed to provide service. This lack of auction success was due to the large size and costs of acquiring BTA-sized geographic license areas. In other words, the use of RSAs would have ensured the provision of wireless cable service throughout the rural areas.

other entity has sought to provide services in the truly rural areas this member serves[31] because it is cost prohibitive. Unlike an entity seeking to quickly enter and exit the market, to the rural telephone company, profitability is not important in the short run (*i.e.* 1-5 years). Profitability only becomes an issue in the long run (6-10 years). Another RTG member who operates in Texas and offers cellular and wireless cable service had a similar experience. But for these rural telephone companies, the smaller sized licensed areas and the stricter buildout requirements, rural areas do not receive services.

Imposing an in-region restriction defeats the ability of rural telephone companies to provide new services to these remote areas. Accordingly, the Commission should not seek to impose in-region restrictions on rural telephone companies. Rural telephone companies should receive an exemption from such eligibility restrictions.[32]

C. The Commission's Proposed Rules for Attribution of Gross Revenues Are Ambiguous and Overly Broad and Will Unduly Limit the Ability of Legitimate Small Businesses to Qualify for Bidding Credits or Other Designated Entity Benefits.

RTG applauds the Commission's attempt to adopt uniform rules and definitions for the attribution of gross revenues of investors and affiliates for all auctionable services. Such rules however, should not be so restrictive as to deny legitimate small businesses the ability to qualify for designated entity benefits.

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[31] For example, one of two areas served by the RTG member is a ranching community of 26 people.

[32] In the LMDS *Second R&O*, the Commission wrongly assumed that the in-region restriction would not apply to rural telephone companies because of their small size. Several of RTG's members will be adversely affected by the eligibility restriction. More critically, the in-region restriction will severely limit all of RTG's members' ability to partition LMDS licenses.

The Commission proposes to adopt a "controlling interest" standard for governing the calculation of gross revenues for determining an applicant's small business status. *FNPRM* at ¶ 185. Under this standard, the Commission proposes to determine the small business status by attributing to the applicant the "gross revenues of the applicant (or licensee), its *controlling interests* and their *affiliates*."[33] Proposed rule section 1.2110(c)(2)(i) defines "Controlling interest" by stating, "For the purpose of the this section, controlling interest includes individuals or entities with both *de jure* and *de facto* control of the applicant.

Regrettably, the proposed rules are ambiguous and overly broad and will eliminate many legitimate small businesses from designated entity benefits. First, although the text of the *FNPRM* states that small business eligibility will be determined "by attributing the gross revenues only of the principals of the applicant who exercise both "*de jure*" **and** "*de facto*" control, and their affiliates," ¶ 185 (emphasis added), the actual rule states, "controlling interest *includes* individuals or entities with both *de jure* and *de facto* control of the applicant." Proposed Section 1.2110(c)(2)(i) (emphasis added). The word "includes" seems to indicate that there may be other entities, *i.e.* those without both *de facto* and *de jure* control that might also be a controlling interest. As RTG will explain below, this a reasonable result, consistent with the affiliation rules of Section 1.2110(b)(4). To the extent that Section 1.2110(c)(2)(i) is read restrictively, as requiring both *de jure* and *de facto* control, RTG opposes this result for the following reasons.

Proposed rule Section 1.2110(b)(3)(ii) states, "Where an applicant (or licensee) cannot

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[33] Proposed Section 1.2110(b)(1).

identify controlling interests under the standards set forth in this section, the gross revenues of all interest holders in the applicant, and their affiliates, will be attributable." The use of the word "identify" is ambiguous in this provision and suggests that the definition of "controlling interest" in proposed Section 1.2110(c)(2)(i) is illustrative and not absolute. To the extent, however, that subsections (c)(2)(i) and (b)(3)(ii) could be read as requiring any applicant in which no one entity owns 51 percent (i.e. *de jure* control) of the applicant to attribute the gross revenues of all interest holders and their affiliates, RTG opposes this result.

RTG notes that under this reading, publicly traded and widely held private companies would be forced to disclose and attribute the gross revenues of every single shareholder and the affiliates of such share holders. Not only is this ridiculous, and burdensome, it defeats the purpose of the rule, mainly to ensure that entities with relatively less capital can compete with entities with greater access to capital. The result is also inconsistent with the affiliation rules under which "[e]very business concern is considered to have one or more parties who directly or indirectly control of have the power to control it," 47 C.F.R. § 1.2110(b)(4)(ii)(A), and a party is presumed to have the power to control a concern even if such party owns, controls, or has the power to control less than 50 percent of the concern's voting stock, if the block of stock owned or controlled is large as compared with any other outstanding block of stock. 47 C.F.R. § 1.2110(b)(4)(iv)(B).

One of RTG's members is a newly formed company owned by numerous rural telephone companies. Four of the companies own relatively large interests (22 percent, 14 percent, 14 percent and 14 percent) while the remaining seven interests are all roughly 6 percent or less. Each of the interest holders has gross revenues not exceeding $15 million, but collectively their

gross revenues exceed $40 million. The newly formed company has gross revenues of under $1 million. Under the proposed rules, this company would not be entitled to take advantage of designated entity provisions. RTG notes that all of the interest holders could form a small business consortia and thereby qualify for designated entity status but these companies should not be forced to jump through this artificial regulatory hoop.

Although the Commission purportedly bases its proposed standard on the recently adopted rules for LMDS,[34] the Commission specifically rejected the use of a "control group" standard in the LMDS rules,[35] opting instead to combine the gross revenues of the applicant, its affiliates and "controlling principals." The Commission specifically declined to establish a specific equity requirement for controlling principals.[36]

Accordingly, RTG proposes that the Commission modify the uniform auction rules in the following manner. The Commission should attribute to an applicant the gross revenues of the applicant and its affiliates. Beyond that, the Commission should attribute to an applicant only the gross revenues of those interests which actually control or have the power to control the applicant and their affiliates.

Even more objectionable than the proposed definition of controlling interest is proposed rule section 1.2110(c)(2)(ii)(F) which states, "Officers and directors of an entity shall be considered to have an attributable interest in the entity." The use of the word "attributable" in

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[34] *FNPRM* ¶ 185.

[35] LMDS *Second R&O* ¶ 352.

[36] *Id.*

this provision is not clear. Presumably, the Commission intends that officers and directors of an entity shall be considered to have a *controlling interest* in the entity. To the extent that the provision could be interpreted as requiring that the personal income or net worth of officers and directors be attributed to the applicant, RTG strongly opposes this provision.

To the extent that the provision could be read as requiring that the affiliates of *all* officers and directors automatically be attributed to the applicant, such provision is over broad. Many of RTG's members are cooperatively organized companies governed by a large board of directors (10 or more board members) in which no one board member has the power to control the company. Many of the board members are ranchers or farmers, whose personal businesses are unrelated to the telecommunications industry. The proposed rule appears to require RTG's members to include in their gross revenue calculations the gross revenues of a board member who also has an attributable ownership interest in a large family farm or ranch which, in turn, may have gross revenues of millions of dollars. This result is ludicrous.

In order to remedy this effect, the Commission should strike subsection (F) in its entirety and rely instead on the affiliation rules. That is, where an officer or director actually has the power to control an entity, then any other businesses controlled by such officer or director would be an affiliate of the applicant and such affiliate's revenues would be attributed to the applicant.

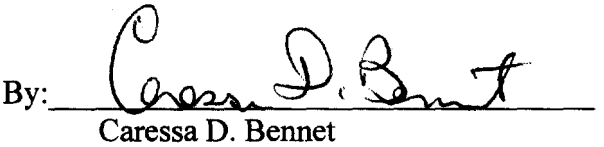
In addition, RTG requests that the Commission create a specific exemption in its affiliation and attribution rules for cooperatively organized rural telephone companies, to clarify that the gross revenues of businesses owned or controlled by members of the cooperative's board of directors, need not be attributed for the purpose of calculating gross revenues.

III. CONCLUSION

The Commission must fulfill its obligations under Section 309(j) of the Communications Act. To date, the competitive bidding policies have not afforded rural telephone companies any opportunity to meaningfully participate in the provision of spectrum-based services, nor have the policies ensured the prompt delivery of service to rural areas. In order to rectify this situation, RTG requests that the Commission adopt the proposals made herein.

Respectfully submitted,

RURAL TELECOMMUNICATIONS GROUP

By: 

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